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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 626

GEORGE W. GREEN, Petitioner,

v.

JOHN W. HOLLAND, AS UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA,

Respondent.

BRIEF OF CITY OF STUART, A MUNICIPAL CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTORY STATEMENT

The proceeding here by the Petitioner is to compel the Respondent, John W. Holland, as United States District Judge for the Southern District of Florida, to reenter a Final Judgment against the City of Stuart, a political subdivision of the State of Florida, which Judgment under direction of the Circuit Court of Appeals for the Fifth Circuit had been heretofore set aside for lack of jurisdic-

tion of the District Court. Although the said John W. Holland is named Respondent, in effect the City of Stuart is actually the Respondent, and the action throughout, until this instance, has been against the City of Stuart.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals of the Fifth Circuit herein sought to be reversed, (R.9) is reported in the Advance Sheets of 114 F. (2d) 1018. This matter also appears in three other Appeals to the Circuit Court for the Fifth Circuit, and also in Petitions for Writs of Certiorari to the Supreme Court of the United States—81 F. (2d) 968, 91 F. (2d) 603, Case No. 480, 58 Sup. Ct. 146, 82 L.Ed. 575, 101 F. (2d) 309, Case No. 831, 59 Sup. Ct. 827, 83 L.Ed. 1510.

JURISDICTION OF SUPREME COURT

Jurisdiction of this Court is invoked by Petitioner under Section 240 (a) of the Federal Code (as amended by the Act of Congress Feb. 13, 1925, Chap. 229, Sec. 1; 43 Stat. 938).

Jurisdiction of the District Court was grounded solely on diversity of citizenship.

STATEMENT OF THE CASE

The City of Stuart, a municipal corporation of Florida, executed three promissory notes of $5,000.00 each, payable to the order of Osceola Golf Club, a corporation of Florida. After maturity Osceola Golf Club endorsed the notes in blank and delivered them to George W. Green, the plaintiff. Green, a citizen of Pennsylvania, sued the City upon these notes in the United States District Court for Southern Florida. The trial court awarded judgment against Green

because when the City executed the notes one of the City Commissioners was pecuniarily interested in the transaction. A Florida statute vitiated such a transaction. On appeal the Circuit Court of Appeals of the Fifth Circuit reversed this judgment in favor of the City and remanded the case for further proceedings. (Green vs City of Stuart, 81 F. (2d) 968).

Upon remand to the District Court the question of jurisdiction was raised and overruled, and thereupon Final Judgment was rendered in favor of Green against the City of Stuart. Upon the second appeal the jurisdictional objection was sustained. (City of Stuart v. Green, 91 F. (2d) 603). Green's Petition for Writ of Certiorari denied Nov. 8, 1937, 58 Sup. Ct. 146, 82 L.Ed. 575. Re-hearing denied Dec. 6, 1937, 58 Sup. Ct. 280, 82 L.Ed. 602.

After the Mandate of the Circuit Court of Appeals on the second Appeal was sent down, with directions to dismiss the suit for lack of jurisdiction of the District Court, the Final Judgment rendered in favor of Green was set aside, and a third Appeal was taken therefrom by Green to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the Order of the District Court setting aside the Judgment. (Green vs City of Stuart, 101 F. (2d) 309. Petition for Writ of Certiorari denied, Case No. 831, 59 Sup. Ct. 827, 83 L.Ed. 1510.)

Green then filed his Petition for Alternative Writ of Mandamus in the Circuit Court of Appeals for the Fifth Circuit (R. 1-2-3-4) to compel Holland, as District Judge, to reenter the former Final Judgment rendered by the said District Court in his favor against the City of Stuart, which Petition was denied (R.9) — In re United States of America ex rel. George W. Green, Relator, praying for a writ of mandamus, No. 9667, 114 F. (2d) 1018 (Advance Sheets). In this proceeding Green seeks to review this last ruling.

ARGUMENT

I The Ruling of the Circuit Court Refusing Writ of Mandamus Adhered To Its Previous Rulings and Which the Supreme Court Declined to Disturb by Its Denial of Petitions For Writs of Certiorari.

The Petitioner states in effect that the Circuit Court of Appeals of the Fifth Circuit reversed its own prior Final Judgement, when on its second Appeal it considered the jurisdictional question. But in no sense did it reverse itself. On the first Appeal it reversed a Judgment in favor of the City of Stuart, and remanded the case for further proceedings. The jurisdictional question was not raised or considered on the first Appeal. No Judgment had gone against the City when the jurisdictional question was invoked. The opinion of the Circuit Court of Appeals on the First Appeal required a re-trial; amended pleadings were offered and a new trial had, all before any Judgment went against the City. The question of jurisdiction was neither considered nor raised on the first Appeal, as made clear in the opinion in 81 F. (2d) 968. Such an objection however is one which cannot be waived, and may be raised by the parties at any time, or considered by the Court on its own Motion.

The jurisdictional principle invoked, which caused the Circuit Court of Appeals in the Second Appeal to direct the District Court to dismiss the suit for want of jurisdiction, was based upon the Federal Assignment Statute, as follows:

> "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said

note or other chose in action if no assignment had been made." (Act of March 3, 1911, c. 231, section 24(1), 36 Stat. 1091, 28 U.S.C.A. section 41(1).)

Jurisdiction had been challenged by the City of Stuart upon the ground that Green was not the original payee, but held the notes as assignee of the Osceola Golf Club, a corporation organized under the laws of Florida, which could not have prosecuted the suit in the Federal Court, even if no assignment had been made.

In this case (City of Stuart v. Green, 91 F. (2d) 603), the Circuit Court sustained this contention, and in its mandate ordered:

> "On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the suit for want of jurisdiction;
>
> It is further ordered and adjudged that the appellee, George W. Green, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court."

Green then filed Petition for Writ of Certiorari, which was denied November 8, 1937 (Case No. 480, 58 Sup. Ct. 146, 82 L.Ed. 575) and re-hearing denied December 6, 1937 (58 Sup. Ct. 280, 82 L.Ed. 602).

In compliance with this Mandate of the Circuit Court of Appeals, the District Court dismissed the suit for want of jurisdiction, and set aside the Judgment which it had previously entered against the City of Stuart, from which Green appealed, being the Third Appeal, in which the Circuit Court affirmed the Judgment of the District Court in Green v. City of Stuart, 101 F. (2d) 309 as follows:

"PER CURIAM.

> On the last appeal of this case to this court, 91 F. 2d 603, the mandate was 'that the judgment of the District Court in this cause be, and the same is hereby reversed, and that this cause be and it is hereby remanded to the said District Court with directions to dismiss the suit for want of jurisdiction.' This the District Court did, but in addition it ordered set aside a judgment which had previously been entered in the District Court after a reversal by this court. 81 F.2d 968. The judgment in the District Court of dismissal for lack of jurisdiction was in accordance with the mandate, and presents no possible error. The additional order setting aside the prior proceedings in the case, while not directed by this court, was a necessary consequence of it. The District Court, having no jurisdiction, could not possibly have rendered any binding judgment. It was proper for the District Court so to declare, and to expunge from its records the judgment improperly entered."

Green again filed his Petition for Writ of Certiorari, which was denied (Case No. 831, 59 Sup. Ct. 827, 83 L.Ed. 1510).

The Circuit Court's refusal to issue a Writ of Mandamus (No. 9667) 114 F.(2d) 1018, Advance Sheets,) was an adherence to its previous rulings, and to those of the Supreme Court in the cases herein cited. The matters argued by the Petitioner are not new, and have all gone before the Circuit Court and this Court in the previous cases. The Briefs of the City in opposition to the other Petitions for Writs of Certiorari are respectfully referred to.

II MANDAMUS IS IMPROPER REMEDY

Mandamus has been resorted to by Petitioner to restore a Final Judgment in his favor against the City of Stuart which had been set aside for want of jurisdiction of the

District Court. The authorities are clear that the action of mandamus under the circumstances as here involved is improper. A decision of an inferior Court cannot be reviewed or reversed by mandamus however erroneous it may be, or be supposed to be. (Ex parte in the matter of David A. Secombe, Sup. Ct. 19; How. 9-16; 15 L.Ed. 565.)

The case of Jonas Grossmayer, petitioner, (Sup. Ct. Reporter's Ed. 48-51; 44 L. Ed. 665) cited by the Petitioner here, sustains the position of the City rather than that of the Petitioner. In such case it appears that a writ of mandamus cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court and a final judgment of the circuit court of the United States for the defendant upon a plea to the jurisdiction cannot, therefore, be reviewed by writ of mandamus.

It would appear that a writ of mandamus can be granted in the United States Courts only after jurisdiction has been acquired. (Greene County v. Daniel, 102 U.S. 187; 26 L.Ed. 99; Labette County v. United States, 112 U.S. 217; 5 Sup. Ct. Rep. 108; 28 L.Ed. 698; Davenport v. Dodge County, 105 U.S. 237; 26 L.Ed. 1018).

Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. (Ex parte Skinner & Eddy Corp. 265 U.S. 86; 44 Sup. Ct. Rep. 446; 68 L. Ed. 912).

It may be here stated that Paragraph (b) under Section 7, Rule 81 of the new rules of Federal Civil Procedure has abolished writ of mandamus.

It is plainly apparent that no reason, as prescribed under paragraph (b), Section 5 of Rule 38 of the Supreme Court, is shown by the Petitioner that would give him any right to a Writ of Certiorari.

CONCLUSION

We submit, therefore, that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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